'Energized' Negotiations: Mediating Disputes over the Siting of Interstate Electric Transmission Lines

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I. INTRODUCTION

With the turn of 2010, America's struggle for clean, reliable energy approached its fourth decade.[1] Though unrealistic in hindsight, President Nixon launched Project Independence in 1974, aiming to completely eliminate America's reliance on foreign energy sources by 1980.[2] Since that time, the federal government has taken an increasingly active role in the nation's energy security, promulgating sweeping energy reform bills each decade.[3] One of the federal government's most assertive actions in the energy realm came with the passage of the 2005 Energy Policy Act (EPAct 2005), where it took substantially greater authority in supervising the transmission of electricity across America.[4] With increasing calls for a nationally revamped electric grid, this heightened authority may burst into the public spotlight.

Looking to the future, increased reliance on renewable energy sources, particularly wind turbines, large-scale solar power, and biomass will be crucial both to increase energy security and attempt to mitigate effects of climate change.[5] However, because much of the nation's renewable energy resources are located in areas distant from cities in which energy is

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[1] *See generally* DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, & POWER (Simon & Schuster Inc. 2008) (1991) (providing comprehensive history of the U.S. energy industry).

[2] U.S. Department of Energy, "Energy Timeline," http://www.energy.gov/about/timeline.htm (last visited Mar. 21, 2010).

[3] *See id.*

[4] *See, e.g.*, Joseph T. Kelliher & Maria Farinella, *The Changing Landscape of Federal Energy Law*, 61 ADMIN. L. REV. 611, 626 (2009) ("[T]he Energy Policy Act of 2005 brought about the most significant change in the laws FERC administers since the New Deal and represents the largest single grant of regulatory power to FERC in the past seventy years.").

[5] Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1016 (2009) (discussing the current transmission infrastructure's inability to accommodate new renewable energy resources).

consumed, policymakers have called for massive expansion of transmission infrastructure.[6] As President Obama has already pledged $11 billion under the American Recovery and Reinvestment Act for a "bigger, better, and smarter grid" that will move renewable energy from the rural places in which it is produced to the cities where it is mostly used,[7] swaths of new land will necessarily be designated for transmission facilities. Indeed, President Obama has promised to "lay down more than 3,000 miles of transmission lines . . . from coast to coast."[8] To coordinate the grid on a national scale, such an endeavor will necessarily require a far-sighted approach.[9]

However, rather than the Federal Energy Regulatory Commission (FERC),[10] state agencies have traditionally claimed exclusive authority over the siting—or the determination of line's location and its authorization—of transmission lines.[11] Linking cities and rural areas to power from increasingly diverse sources, the North American electricity grid is a massive and complex system.[12] Projects updating the grid are often enormous in scope, transcending state lines and requiring cooperation between multiple

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[6] *Id.* For instance, because of their distance from consumers in Chicago, wind turbines in sparsely populated North Dakota and the Rocky Mountains require massive new transmission infrastructure. *Id.* at 1029. For a concise overview of this issue, see Matthew L. Wald, *Wind Energy Bumps into Power Grid's Limits*, N.Y. TIMES, Aug. 27, 2008, at A1.

[7] White House Issues, Energy and the Environment, http://www.whitehouse.gov/issues/energy-and-environment (last visited Mar. 21, 2010).

[8] Macon Phillips, The White House Blog, President Obama Delivers Your Weekly Address, Jan. 24, 2009, http://www.whitehouse.gov/president-obama-delivers-your-weekly-address (last visited Nov. 11, 2010).

[9] Tara Benedetti, *Running Roughshod? Extending Federal Siting Authority Over Interstate Electric Transmission Lines*, 47 HARV. J. ON LEGIS. 253 (2010) (discussing recent proposals to expand federal authority over the siting of electric transmission lines).

[10] FERC is the federal agency charged with the regulation of the interstate transmission of electricity, natural gas, and oil. Federal Energy Regulatory Commission, What FERC Does, http://www.ferc.gov/about/ferc-does.asp (last visited Mar. 23, 2010).

[11] Debbie Swanstrom & Meredith M. Jolivert, *DOE Transmission Corridor Designations & FERC Backstop Siting Authority: Has The Energy Policy Act of 2005 Succeeded in Stimulating the Development of New Transmission Facilities?*, 30 ENERGY L.J. 415, 415 (2009); *see also* Rossi, *supra* note 5, at 1017.

[12] *See* David H. Meyer & Richard Sedano, *Transmission Siting and Permitting*, *in* NATIONAL TRANSMISSION GRID STUDY ISSUE PAPERS, E-1 (Dep't Energy May 2002), *available at* http://www.ornl.gov/sci/btc/apps/Restructuring/NTGS%20Issues%20Papers.pdf (reviewing transmission siting and permit process, and documenting a host of cases where agencies' disparate priorities and failures to effectively communicate with one another have substantially impeded the construction of transmission lines).

state and federal agencies.[13] Despite the advantages of inter-agency cohesion, states and reviewing agencies often favor projects that benefit their own jurisdictions, with less concern for potential adverse impacts in others, leading to delays and higher expenses in the siting process.[14] This process has resulted in a patchwork of state-authorized facilities, inadequate in both capacity and reliability.[15] In response to these difficulties, EPAct 2005 granted FERC increased responsibility, allowing federal "backstop" authority to site transmission lines under certain circumstances.[16] Analogizing to baseball, individual states act as the catcher, with the first chance to stop the ball, and FERC acts as the backstop behind the catcher, used only if the catcher fails to effectively field the ball.[17]

In certain cases of a "missed pitch," i.e., a state's refusal or inability to consider interstate benefits of in-state transmission lines, or extended delay in state approval of a project, FERC may approve the project and grant a private utility the right to use eminent domain authority to condemn needed land for transmission facilities.[18] Given the enormous scope of such transmission projects, increased nationalization of transmission line siting potentially represents a literal and figurative "power grab" by FERC from local landowners and authorities.[19] Moreover, a number of bills introduced in both bodies of Congress call for increasing FERC's power to preempt state laws in siting interstate transmission projects.[20] Though a goal of EPAct 2005 was to streamline the siting of transmission facilities, relying increasingly on eminent domain to overpower disgruntled landowners is not the best means

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[13] *Id.*

[14] *Id.*; *see also infra* Part III.A.

[15] DEP'T OF ENERGY, NATIONAL ELECTRIC TRANSMISSION CONGESTION STUDY 4 (2006) http://nietc.anl.gov/documents/docs/Congestion_Study_2006-9MB.pdf (last visited Mar. 22, 2010).

[16] Swanstrom & Jolivert, *supra* note 11.

[17] *Id.* at 422.

[18] 16 U.S.C. § 824p(e) (2006) ("[I]f the permit holder cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct or modify the transmission facilities, the permit holder may acquire the right-of-way by the exercise of the right of eminent domain in the district court of the United States for the district in which the property concerned is located, or in the appropriate court of the State in which the property is located.").

[19] *See, e.g.*, Jacob Dweck, David Wochner & Michael Brooks, *Liquefied Natural Gas (LNG) Litigation After the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 ENERGY L.J. 473, 476 (2006) (discussing early criticism of EPAct 2005).

[20] *See infra* Part III.C (reviewing these bills).

of advancing this goal. Widespread federal use of eminent domain is likely to anger landowners attempting to retain their private property rights, and could potentially unleash a public outcry against the perceived overuse of governmental condemnation power.[21] In any event, EPAct 2005's protocol for siting interstate transmission lines should be revised to foster procedural justice for landowners as well as greater efficiency.

This note proposes mediation as a solution to the inefficiencies and social injustices inherent in power companies' use of eminent domain under FERC's interstate transmission line-siting regime. Part II of the note briefly discusses FERC's longstanding vesting of private energy companies with eminent domain power under the Natural Gas Act (NGA). Part III examines electric companies' use of eminent domain power, discussing state regimes, federal backstop jurisdiction under EPAct 2005, and bills proposing expansion of this power in Congress. Part IV discusses states' reform to eminent domain law since the Supreme Court's holding in *Kelo v. City of New London*, focusing on measures increasing public participatory requirements. This section then considers the effects such reforms may have on the siting of transmission lines. Part V discusses the need for an improved process for the federal siting of interstate transmission facilities that would effectively balance private property rights with the need to quickly update the nation's electric transmission infrastructure. Here, this note argues that enhancing opportunities for the public to participate in the siting process can increase the quality of decisions made as well as these decisions' legitimacy, without compromising efficiency. Finally, Part VI advocates for mediation as the best means to advance these goals, providing an overview of a multilateral mediation model and procedural recommendations.

II. BACKGROUND: ENERGY COMPANIES' USE OF EMINENT DOMAIN UNDER THE NATURAL GAS ACT

Under the Fifth Amendment, the government may take privately-owned property and convert it to public use, so long as it demonstrates a public need for the project and adequately compensates the property owner for its loss.[22]

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[21] *See, e.g.*, *The Kelo Decision: Investigating Takings of Homes and Other Private Property, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 14 (2005) (statement of Prof. Thomas W. Merrill, Charles Evan Hughes Professor, Columbia Law School) (stating that "the American people believe that property rights are invested with moral significance").

[22] U.S. CONST. amend. V; First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 314 (1987).

While historically this power was justified simply by government's sovereign power, modern theorists cite takings power as the most efficient mechanism for the government to fulfill its role as the provider of public goods.[23] This efficiency justification often rests upon the premise that the government would be the highest-value owner of a given piece of property.[24] Holdout problems create another compelling justification for the government's takings power.[25] If, in the midst of a large-scale government project, a single landowner refuses to surrender his land to the project, this could destroy the entire project.[26] With knowledge of the government's irreplaceable need for his land, this landowner may insist upon an unreasonably high price for the land to maximize his personal profit at the public's expense.[27] A practical solution to this difficulty, therefore, is to allow the government to seize the property against the landowner's will, so long as it provides adequate compensation.[28]

Since the nineteenth century, by virtue of their satisfying a traditional governmental function, the government has in some circumstances delegated eminent domain power to private entities.[29] Across many states, companies in the business of building electric facilities, roads, turnpikes, canals, railroads, water systems, sanitary sewer systems, and television satellite systems have all utilized takings power.[30] Under these laws, companies addressing enumerated public interests may independently exercise eminent domain power in a manner similar to that which the government would exercise independently. While critics have charged that private takings power violates the Fifth Amendment's "public use" requirement, courts have generally held private takings constitutional so long as they provide a public benefit sufficient to justify the use of eminent domain.[31]

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[23] *See* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 529 (2009) (comprehensively discussing societal justifications for eminent domain doctrine, both historical and modern).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Bell, *supra* note 23, at 529

[30] *Id.* at 546.

[31] *Id.* at 547.

Providing the public with reliable energy is one frequently exercised public use sufficient to justify a taking.[32] Although the FERC, until the passage of EPAct 2005, lacked jurisdiction over the siting of transmission lines, it has long retained national jurisdiction over the siting of gas lines under the Natural Gas Act (NGA).[33] Here, the FERC grants power companies certificates of public convenience and necessity to allow them to undertake a specified range of activities needed to carry out their routine business.[34] These are required for any gas company to operate in a given area.[35] When unable to agree with property owners on compensation to be paid for easements to construct, operate, and maintain gas pipelines, holders of these certificates may circumvent state authority and acquire eminent domain rights in federal district courts.[36] Power companies may further obtain blanket certificates, under which, rather than needing FERC approval on a project-by-project basis, they may undertake an unlimited number of projects without specific FERC approval.[37] Provided that these companies meet minimal notification standards, blanket certification holders retain floating eminent domain power, where they can affect a taking on any property they deem necessary.[38]

A. *Negotiation Requirements*

Importantly, in these and any eminent domain proceedings, a condemnor must first attempt to negotiate an agreement with the landowner to acquire the needed property rights by contract before utilizing its takings power.[39] Under the NGA, however, the required quality and extent of the requisite negotiations remains unclear.[40] District courts have split over whether there

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[32] *See, e.g.*, Coronado Oil Co. v. Grieves, 603 P.2d 406, 411 (Wyo. 1979) (citing the "great public interest in an imminent need for energy").

[33] 15 U.S.C. §§ 717–717z (2000).

[34] *Id.* § 717f (2000).

[35] *Id.*

[36] *Id.* § 717f(h) (2000). While the statute does allow State courts to grant takings power, takings in State courts under the NGA are extremely rare. *See* Jim Behnke & Harold Dondis, *The Sage Approach to Immediate Entry By Private Entities Exercising Federal Eminent Domain Authority Under The Natural Gas Act and The Federal Power Act*, 27 ENERGY L.J. 499, 504 (2006).

[37] 18 C.F.R. § 157.203 (2010).

[38] Behnke & Dondis, *supra* note 36, at 505.

[39] *Id.* at 509.

[40] *Id.*

is an implied requirement to negotiate in good faith under the NGA. On one hand, some jurisdictions have required power companies, at minimum, to make an offer to purchase right of way from a landowner.[41] On the other hand, the language of the NGA contains no express good faith negotiations mandate, simply requiring:

> When any holder of a certificate of public convenience and necessity *cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for*, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.[42]

As such, courts have frequently cited the lack of any mention of a good faith negotiations requirement in the statutory language above as indicative of them not being required.[43]

Generally speaking, courts have favored power companies over private landowners in eminent domain disputes under the NGA.[44] Indeed, Congress's very intent in allowing eminent domain under the NGA was to create a procedure that would reduce the ability of a financially-motivated landowner to halt pipeline construction.[45] Given this intent, it is natural that courts have been reluctant to require a power company to negotiate in good faith, as such a mandate would inevitably slow an already tedious construction process. Still, the presence of good faith negotiation

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[41] *See, e.g.*, Transcon. Gas Pipe Line Corp. v. 118 Acres of Land, 745 F. Supp. 366 (E.D. La. 1990) (finding that a power company's offer based on an appraisal of the affected properties using standard methodologies, along with meeting twice with the property owner was sufficient to satisfy the good faith negotiation requirement).

[42] 15 U.S.C. § 717f(h) (2000) (emphasis added).

[43] Kan. Pipeline Co. v. A 200 by 250 Foot Piece of Land, 210 F. Supp. 2d 1253, 1257 (D. Kan. 2002) (reviewing cases in which courts imposed a good faith negotiations requirement, as well those wherein this was not required).

[44] Lauren Mohr, *The Tangled Web: Regulation, Interstate Pipeline Companies, and Due Process Rights of Property Owners*, 26 ENERGY L.J. 191 (2005) (providing overview of eminent domain procedure under the NGA and citing an array of cases).

[45] Humphries v. Williams Natural Gas Co., 48 F. Supp. 2d 1276, 1279 (D. Kan. 1999). The legislative history of EPAct 2005 reflects an identical concern, though with respect to transmission lines. *See* R. Seth Davis, *Conditional Preemption, Commandeering, and The Values of Cooperative Federalism: An Analysis of Section 216 Of EPAct*, 108 COLUM. L. REV. 404, 408 n.29 (2008).

requirements in some jurisdictions reflects a degree of judicial sensitivity to landowners' basic property rights, and most likely stems to an extent from due process concerns as well.

B. *Due Process*

The Fifth Amendment's requirement that "no person shall . . . be deprived . . . of property, without due process of law"[46] poses a challenge to the legitimacy of takings by power companies. Although the Fifth Amendment provides no such requirement for conduct by private actors, by employing federal eminent domain power, a fundamental government function, courts have held that power companies gain the status of a government actor.[47] As government-authorized actors exercising a traditional government function, utilities should be held to a similar due process standard as the government itself.[48]

At a minimum, due process requires "notice and an opportunity to be heard[,]. . . 'granted at a meaningful time and in a meaningful manner' before a person may be finally deprived of his constitutionally protected interests."[49] Under the NGA, property owners may voice their concerns over a blanket certificate holder's actions to the FERC, and the Federal Rules provide a FERC Enforcement Hotline, where aggrieved landowners may attempt to resolve disputes informally with the Hotline Staff.[50] However, commentators have questioned whether this hotline provides property owners the opportunity to be heard at a time and manner sufficiently meaningful to satisfy due process concerns.[51] Indeed, when a power company holds a blanket certificate, the FERC has been generally reluctant to hear individual cases, having explained:

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[46] U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV (applying this principle to the states).

[47] Pavelich v. Natural Gas Pipeline Co. of Amer. 2002 U.S. Dist. LEXIS 23946, 2002 WL 31804410 (N.D. Ill. Dec. 12, 2002).

[48] Mohr, *supra* note 44, at 191.

[49] *Id.* (quoting *Denver Welfare Rights Org. v. Colo. Pub. Util. Comm'n*, 547 P.2d 239, 247 (Colo. 1976) (en banc)).

[50] 18 C.F.R. § 157.203 (2010) (authorizing unsatisfied landowners to call the Hotline). "Any person may seek information or the informal resolution of a dispute by calling or writing to the Hotline. . . . The Hotline Staff will informally seek information from the caller and any respondent, as appropriate. The Hotline Staff will attempt to resolve disputes without litigation or other formal proceedings." *Id.* § 1b.21(b).

[51] *See* Mohr, *supra* note 44, at 197–200.

> [W]e perceive no legal, policy or administrative purpose to be served by continuing to process applications for authority to perform transactions that the applicant has full authority to perform. The Commission has limited resources, and those resources are best allocated to the processing of applications whose grant or denial will have a meaningful and tangible effect on the service that can be rendered.[52]

With the constitutional right of due process within the FERC already reduced to a telephone hotline wherein property owners may voice their concerns only informally, these landowners often lack a meaningful venue in the federal courts. Once blanket certificate holders invoke eminent domain power, landowners utilize federal district courts to litigate over the amount of compensation for the taking, but not over the issue of the taking itself.[53] In this context, federal courts have explicitly limited their forum in eminent domain proceedings to one for deciding the issue of proper compensation, "not . . . an additional forum to attack the substance and validity of a FERC order."[54] Lacking power to have their concerns heard by either the FERC or district courts, it is questionable whether aggrieved landowners retain procedural due process rights.

III. USE OF EMINENT DOMAIN TO SITE TRANSMISSION LINES: STANDARDS AND PROCEDURES UNDER STATE REGIMES, FERC, AND PROPOSED CHANGES

Basic differences between natural gas pipelines and electric transmission lines give rise to issues largely unprecedented under the NGA. Most critically, natural gas pipelines are underground, thus giving rise to substantially fewer property concerns than are associated with the siting of above-ground, highly visible transmission lines.

A number of studies have found that the presence of electric transmission lines adversely affects property values, and that this effect is particularly robust in rural areas, where estimates of value reduction have in some cases

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[52] *Tenn. Gas Pipeline Co.*, 43 F.E.R.C. P 61,042, 61,126 (1988). *See also* Mohr, *supra* note 44, at 198 n. 41 (reviewing cases that demonstrate the FERC's general deferral of case-specific siting decisions to private entities holding blanket certificates).

[53] Mohr, *supra* note 44, at 200–02.

[54] Williams Natural Gas Co. v. City of Okla. City, 890 F.2d 255, 269 (10th Cir. 1989) (reversing a district court's injunction against a power company's exercise of rights under its FERC-granted certificate of public convenience and necessity).

exceeded 15 percent.[55] In stark contrast, the presence of underground natural gas lines has never been shown to have an affect on property values.[56] As such, landowners have often vehemently resisted the construction of transmission lines near their property, and by doing so have often been at the core of the transmission line projects' delay or failure.[57] Consequently, regimes siting electric transmission lines must consider issues related to private property to a greater extent than those siting natural gas lines. In particular, courts may be faced with the task of balancing the national goal of expediting the siting of interstate transmission lines against local property interests.[58]

"Perhaps the greatest obstacle to the construction of new [electric] transmission [capability] . . . is the age-old problem of gaining approval for new transmission lines."[59] This phenomenon, often referred to as "Not In My Backyard" (NIMBY), where local landowners, though potentially in favor of the construction of a given structure that would benefit the public, do not want to bear the burden of seeing this facility near their own communities, applies with particular potency to the siting of transmission lines.[60]

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[55] Cynthia A. Kroll & Thomas Priestly, *The Effects of Overhead Transmission Lines on Property Values: A Review and Analysis of the Literature (Internet Edition 2003), available at* http://staff.haas.berkeley.edu/kroll/pubs/tranline.pdf; *see also* Stanley W. Hamilton & Gregory M. Schwann, *Do High Voltage Electric Transmission Lines Affect Property Value?*, 71 LAND ECON. 436 (1995) (concluding, based on empirical research, that properties adjacent to a transmission line lose an average of 6.3% of their value, primarily as a result of proximity and visual impact).

[56] Eric Fruits, *Natural Gas Pipelines and Residential Property Values: Evidence from Clackamas and Washington Counties*, (Unpublished Draft, Feb. 20, 2008), http://pdx.academia.edu/documents/0046/7196/2008_Natural_Gas_Pipelines_and_Residential_Property_Values.pdf (last visited Apr. 2, 2010). This recent study was the only the author could find on the subject of natural gas pipelines and property values. The lack of work on this subject is itself evidence of this issue's relative unimportance, and stands in plain contrast to the presence of extensive literature on the effect of above-ground electric transmission lines on property values.

[57] Ward Jewell, *A New Method for Public Involvement in Electric Transmission-Line Routing*, 24 IEEE TRANSACTIONS ON POWER DELIVERY 2240, 2240 (2009).

[58] *See generally* Steven J. Eagle, *Securing a Reliable Electricity Grid: A New Era in Transmission Siting Regulation?*, 73 TENN. L. REV. 1 (2005) (discussing the need for new transmission capacity and siting obstacles, reviewing and assessing EPAct 2005's effects).

[59] *Id.* at 3.

[60] Rossi, *supra* note 5, at 1021–23.

Local opposition to transmission line projects has prevented or delayed their construction in numerous cases, frequently in cases where their development is much needed for local, regional, and even national energy reliability.[61] For instance, local opposition based around environmental impacts on native plants, wildlife, and archaeological sites caused the failure to build a 230 mile, high-voltage transmission line from Blythe, California, to the Palo Verde Nuclear Generating Station, fifty miles west of Phoenix, Arizona.[62] Although California regulators approved the project, Arizona rejected it because of the above concerns and its lack of benefit to Arizona citizens.[63] Most essentially, Arizonians objected to the transmission line's use of "our land, our air and our water to provide electricity to California."[64]

Generally, local opposition to a major electricity infrastructure facility is at the heart of its failure to be built, and in a highly charged, politicized atmosphere, demonstration of public need for the facility seems inadequate to persuade local landowners to its favor. Indeed, a project's success is usually dependent on site-specific circumstances, including local economic conditions, the community's need for tax revenues that would flow from the facility's development, population density, and the composition of local political bodies responsible for the siting process.[65] In response to the interaction between these difficulties and the need to "expedite the construction of critical transmission lines identified by the [Department of Energy],"[66] Congress passed EPAct 2005, amending the Federal Power Act (FPA) to create partial federal jurisdiction over the electricity grid.[67] However, because FERC acts only as a "backstop" authority behind state

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[61] Eagle, *supra* note 58, at 25.

[62] S. Cal. Edison Co., Case No. 130, Decision No. 69638 (Ariz. Corp. Comm'n June 6, 2007), 2007 WL 2126365, *available at* http://images.edocket.azcc.gov/docketpdf/0000073735.pdf.

[63] *Id.*

[64] Press Release, Ariz. Corp. Comm'n, Regulators Reject "Extension Cord for California": Commissioners Reject Palo Verde to Devers II Power Line 2 (May 30, 2007), *available at* http://www.cc.state.az.us/divisions/administration/news/Devers_II_Vote.pdf (quoting Commissioner Bill Mundell).

[65] *Id.*

[66] H.R. REP. No. 108-65, at 170 (2003).

[67] FERC, *A Guide to the FERC Electric Transmission Facilities Permit Process*, *available at* http://www.ferc.gov/for-citizens/citizen-guides/electric/guide-transmission-8-08.pdf. It is worth noting, however, that any siting commission must address a myriad of concerns aside from the landowners', including complex environmental assessments, safety issues, sufficiency of financing for the project, the degree of need for the project, and the merit of proposed alternatives. *See id.*

jurisdiction, and even this authority exists only in specially designated regions of the country, individual state procedures remain predominant.[68]

A. *Siting Transmission Lines Under State Regimes*

Historically, state agencies exclusively authorized the construction of transmission lines, while FERC's role was quite circumscribed.[69] Due largely to the limited distance over which electricity could travel, there was only limited need for cohesion among utilities from diverse locations.[70] However, technological advances and expanding markets have demanded that electricity be moved over greater distances, often crossing state boundaries or entire regions.[71] Further, the emergence of larger companies operating across state lines, regionally-based regulatory standards, and states depending on one another for electricity supplies has increasingly demanded regional cooperation and planning.[72]

Still, states retain initial jurisdiction over transmission line siting, and each state has its own procedure for approving a project, which it administers either through its public utilities commission or a separate siting board.[73] While each state does have its own siting protocol, landowners in most states may become involved in the siting process by applying for intervenor status, granted upon showing that they have an interest that is not already adequately represented.

Enormous in scale, some new transmission projects may run through an entire state without providing substantial benefit to the state itself.[74] Importantly, while some state procedures do allow siting commissions to consider benefits to other states, others require a showing of benefit for

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[68] 16 U.S.C. § 824p(b) (2006).

[69] Swanstrom & Jolivert, *supra* note 11, at 418.

[70] Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 681 (D.C. Cir. 2000), aff'd, 535 U.S. 1 (2002) (cited in Swanstrom & Jolivert, *supra* note 11).

[71] National Council on Electricity Policy, Coordinating Interstate Electric Transmission Siting: An Introduction to the Debate 2 (July 2008) (cited in Swanstrom & Jolivert, *supra* note 11).

[72] Swanstrom & Jolivert, *supra* note 11, at 419.

[73] Eagle, *supra* note 58, at 13.

[74] Mark A. de Figueiredo, *A Regulatory Framework for Investments in Electricity Transmission Infrastructure*, 26 VA. ENVTL. L.J. 445, 450 (2008) (arguing for a siting approach that better coordinates FERC and individual states); *see also* Eagle, *supra* note 58, at 25.

citizens of that state.[75] Stemming from their historic role evaluating proposals in relative isolation from interstate concerns, many states still tend to focus on their own needs, rather than regional ones.[76]

New transmission lines generally must run through privately owned land, requiring utilities to obtain easements in order to begin construction.[77] Because of the sheer number of private properties often implicated by such projects, utilities frequently are unable to acquire these easements through negotiations with landowners, and instead resort to eminent domain.[78] To exercise the power of eminent domain, a utility must demonstrate a public need for the project.[79] Many states may not use eminent domain power for a public use outside their own borders when there is no substantial benefit to citizens of that state.[80]

As such, in response to attempted takings by utilities for the construction of large interstate transmission lines, some state courts have held that the construction of power lines in their state, while improving regional stability, will not provide enough benefit to citizens of that state to justify the use of eminent domain.[81] However, courts vary in their requirements of nexus between transmission projects and in-state benefits, with some more willing

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[75] Figueiredo, *supra* note 74, at 450.

[76] *Id.*; *see also* Eagle, *supra* note 58, at 25.

[77] Eagle, *supra* note 58, at 13.

[78] *Id.*

[79] *Id.*

[80] *See* Adams v. Greenwich Water Co., 138 Conn. 205, 214 (Conn. 1951); Shedd v. N. Ind. Pub. Serv. Co., 188 N.E. 322, 326 (Ind. 1934) (holding that the test of right of power company to condemn right of way easement for transmission lines is whether use is public use which will serve interests of people of state); *see also* Rocky Mountain Mineral Law Institute, *Acquisition of Mining and Mine-Related Rights Through Eminent Domain*, 27 ROCKY MTN. MIN. L. INST. 757 (1982) (stating that, "although other states may also be benefitted, the public in the state which authorizes the taking must derive a substantial and direct benefit"); J.T.W., *State Power of Eminent Domain as Affected by Interstate Character of Uses to Which Property Taken Is to Be Devoted*, 90 A.L.R. 1032, 1035 (1934) ("The rule is apparently well settled that property cannot be condemned by virtue of the state's power of eminent domain, if no direct benefit from its proposed use is to accrue to the state in which it is located, or to at least a few inhabitants thereof.").

[81] *Id.*; *see also* Ashley C. Brown & Damon Daniels, *Vision Without Site: Site Without Vision*, ELECTRICITY J., Oct. 2003, at 23 (reviewing states' varying willingness to consider out-of-state benefits in siting and granting eminent domain powers to utilities for transmission projects).

than others to consider out-of-state benefits.[82] On the parochial extreme, for example, The Supreme Judicial Court of Massachusetts has held that its Energy Facilities Siting Board is without authority to approve a transmission project unless that project benefits in-state consumers.[83] Likewise, state transmission line siting statutes of New York[84] and Florida[85] do not mention consideration of interstate benefits. At the other end of the spectrum, "a few states . . . have authorized siting officials to assess regional considerations in determining the need for an electricity project."[86] Generally, however, most states fall somewhere between these extremes, although "in most states, parochialism casts a significant, although not always determinative, shadow over the process by which electricity projects clear the necessary legal hurdles."[87]

Although EPAct 2005 has made a significant stride toward increased regionalization and nationalization of the siting of transmission lines, because the FERC has only backstop authority, state laws remain predominant. The FERC's jurisdiction over electric lines has generally moved transmission projects forward not directly under its own protocol, but indirectly through influence over states' internal siting procedures. These procedures thus remain crucial to utilities' use of eminent domain to site such projects.[88] In the common case that the FERC's backstop jurisdiction is not

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[82] For a discussion, see Rossi, *supra* note 5, at 1025–34; *see also* Brown & Daniels, *supra* note 81.

[83] Point of Pines Beach Ass'n v. Energy Facilities Siting Bd., 644 N.E.2d 221, 223–24 (Mass. 1995); *see also*, Miss. Power & Light Co. v. Conerly, 460 So. 2d 107 (Miss. 1984) (The court to grant eminent domain for transmission line siting because "not one Mississippi customer is to be served by the proposed transmission line. . . . The terms 'public necessity' and 'public use' as set out in the statutes that regulate the duties of the [Mississippi Public Service Commission], contemplate use by the citizens of this state.").

[84] *See* N.Y. PUB. SERV. LAW § 126 (Consol. 2009).

[85] *See* Florida Electric Power Plant Siting Act, FLA. STAT. §§ 403.501–.518 (2009); Florida Electric Transmission Line Siting Act, FLA. STAT. §§ 403.52–.5365 (2009).

[86] Brown & Daniels, *supra* note 81, at 32. *See, e.g.*, OHIO REV. CODE. ANN. § 4906.10 (West 2009) (including consideration of whether "the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability" in its statutory regime for transmission line siting).

[87] Brown & Daniels, *supra* note 81, at 25.

[88] Swanstrom & Jolivert, *supra* note 11, at 457. *See infra* Part III.B (discussing the FERC's backstop siting procedure).

actually invoked, state procedure will govern transmission lines siting, and thus each affected state separately approves the project.[89]

As such, even in spite of federal backstop authority, states may be prone to give weight to parochial concerns such as aesthetics, driven in part by local political support and short-term politics, at the expense of national priorities.[90] Driven in part by this concern, Congress passed EPAct 2005, increasing federal jurisdiction for the siting of transmission lines in designated regions of the country.

B. *FERC's Backstop Siting Process Under The Energy Policy Act of 2005*

EPAct 2005 amended the Federal Power Act (FPA) to grant the FERC backstop jurisdiction over two large regions of the U.S., referred to as National Interest Electric Transmission Corridors.[91] As backstop authority, the FERC review is entirely separate from state-level review, applying only in five circumstances.[92] They are when: (1) a state in which the transmission facilities are to be constructed or modified does not have the authority to approve the siting;[93] (2) a state does not have the authority to consider the expected interstate benefits to be achieved by the proposed project;[94] (3) a

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89 Eagle, *supra* note 58, at 13.

90 *Id.* at 25.

91 16 U.S.C. § 824p(a) (2006). These were created by the Department of Energy (DOE) in 2007, but the DOE retains the ability to create more such corridors. Presently, the first, the Mid-Atlantic Area National Corridor, includes parts of New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, and Washington, D.C. The second, the Southwest Area National Corridor, stretches across parts of California, Nevada, Utah, and Arizona. *See* Dep't of Energy, National Electric Transmission Corridor Report and the Ordered National Corridor Designations, *available at* http://nietc.anl.gov/nationalcorridor/index.cfm.

On Feb. 1, 2011, the Ninth Circuit vacated the DOE's designation of both of these Corridors, holding that in creating these areas the agency failed both to consult with the affected states as mandated by EPAct 2005 and to evaluate the environmental impact of the designations as required by the National Environmental Policy Act. Cal. Wilderness Coal. v. U.S. Dep't of Energy, No. 08-71074, slip op. (9th Cir. Feb. 1, 2011). The court held that the DOE must fulfill both of these requirements to re-designate the Corridors or to create new ones. *Id.* at 1947, 1967.

92 *See* 16 U.S.C. §824p(b) (2006) (identifying the conditions for the FERC's authority to be triggered).

93 *Id.* § 824p(1)(A)(i).

94 *Id.* § 824p(1)(A)(ii).

permit applicant is a transmitting utility under the FPA, but does not qualify for a permit in a particular state because it does not serve end-use customers in that state;[95] (4) a state commission has withheld approval for more than one year after the filing of an application or the designation of the relevant national interest corridor, whichever is later;[96] or (5) a state commission has conditioned its approval in such a manner that the proposed construction or modification is not economically feasible or will not significantly reduce transmission congestion in interstate commerce.[97]

Generally, these provisions reflect Congress's intent to allow FERC to act only when state actions would impede the development of projects whose benefits transcend that state.[98] As illustrated, FERC may exercise siting authority over states such as New York and Florida, which refuse to consider out-of-state benefits in their siting regimes, and therefore may preempt the most parochially oriented states.[99] Alternatively, FERC may preempt states that delay projects for over a year.[100] Thus, although FERC's backstop jurisdiction does represent a step toward the federalization of transmission siting, Congress nonetheless limited this authority to relatively narrow circumstances, illustrating its concern for local needs and desire to retain state primacy.[101]

Under its siting regime, FERC requires a regimented pre-filing procedure, and with it elaborate public integration requirements to accommodate local interests. Pre-filing is a process required prior to actual filing, where FERC defines the specific issues raised by the project, and begins its independent environmental analysis.[102] During this segment of the review, FERC requires initial consultations with applicants, ensures all affected landowners are notified, and gathers stakeholder input.[103]

The pre-filing process is used largely to consider the effects of the proposed facilities on individual landowners and local communities, and give all interested entities or individuals (stakeholders) opportunities to be

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[95] *Id.* § 824p(1)(B).

[96] *Id.* § 824p(1)(C)(i).

[97] *Id.* § 824p(b)(1)(C)(ii).

[98] Piedmont Envtl. Council v. F.E.R.C., 558 F.3d 304, 313–14 (4th Cir. 2009), *cert. denied*, U.S. No. 09-343 (Jan. 19, 2010) (refusing to allow the FERC permitting authority when a state has affirmatively denied a permit application within one year).

[99] 16 U.S.C. § 824p(1)(B) (2006).

[100] *Id.*

[101] *Piedmont*, 558 F.3d at 313–14.

[102] 71 Fed. Reg. 69,440, 69,452 (Dec. 1, 2006).

[103] 18 C.F.R. § 50.5 (2009).

heard.[104] In addition to making a good faith effort to notify all affected landowners of the project, applicants must develop a Project Participation Plan, which demonstrates specific tools and actions that facilitate outreach to the public, providing accurate and timely information to all stakeholders.[105] Once the formal application is filed, stakeholders who want to remain involved may file a motion to formally intervene in the case.[106] Clearly, the FERC in its siting process intends to integrate the public to a large extent, expressly "offer[ing] numerous occasions for stakeholders to express their interests and make meaningful contributions."[107]

However, the FERC's process does not achieve this goal at a satisfactory level. For one, while the Project Participation plans are likely to facilitate communication and help make information more available, they are not designed toward consensus-building.[108] Rather, public officials will be more likely to allow these public participation efforts "just for show."[109] Moreover, in the case of FERC preemption of state authority, it is likely that a state, rather than a federal agency, would most thoroughly consider landowner interests.[110] Because local officials answer to the community they serve, they are likely to give much greater weight to concerns of local landowners than would the federal regime.[111] Despite the FERC's efforts toward inclusion, increasing regionalization, especially in combination with federal backstop authority, has been criticized frequently as unlikely to adequately respond to

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104 71 Fed. Reg. 69,440-01, 69,452 (Dec. 1, 2006); *see also* 18 C.F.R. pt. 50 (2009) (stating that the purpose of the pre-filing process is to "facilitate maximum participation from all interested entities and individuals and to assist an applicant in compiling the information needed to file a complete application").

105 71 Fed. Reg. 69,440-01 (Dec. 1, 2006).

106 18 C.F.R. pt. 50.

107 71 Fed. Reg. 69,450 (Dec. 1, 2006).

108 Jonathon Raab & Lawrence Susskind, *New Approaches to Consensus Building and Speeding up Large-Scale Energy Infrastructure Projects* 5, Presented at Conference: The Expansion of the German Transmission Grid (Gottingen University, Germany June 23, 2009), *available at* http://web.mit.edu/dusp/epp/pdfs/New_Approaches_Consensus_Building.pdf.

109 *Id.* at 10.

110 *See* Eagle, *supra* note 58, at 27–31 (comparing the influence local concerns have on local agencies as opposed to the influence that they have on regional or federal agencies in transmission siting).

111 *Id.* at 25; *see also* Brown & Daniels, *supra* note 81, at 25 ("In most states, parochialism casts a significant, although not always determinative, shadow over the process by which electricity projects clear the necessary legal hurdles.").

landowner concerns.[112] Critics have marshaled additional concern that over time, increased federal authority could erode local power as the FERC preempts more state administrations.[113] Evidencing the fact that citizens themselves share this concern, a recent poll found that while only 10% of respondents said the federal government should have ultimate authority to site transmission lines, 60% preferred delegating this responsibility to local government.[114] Currently, however, state regimes remain predominant.

Moreover, neither the FPA nor the FERC's regulations mandate public hearings in areas affected by plans for transmission lines.[115] These hearings would offer participants opportunities to learn more about the project, views of similarly situated citizens, and discuss their concerns with each other and the project developers.[116] In response to the inadequacies of the public participation mechanisms currently in place, members of Congress have introduced twin pieces of legislation in the House and Senate seeking to amend the FPA to require public hearings.[117] Here, the FERC would be required to hold "at least [one] public hearing in each county and locality affected."[118] As of this writing, these bills remain in committee,[119] and as drafted provide venues for landowners to vent their concerns, but no measures to actually empower the public.[120] Nonetheless, these bills'

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112 *See* Meyer & Sedano, *supra* note 12, at E-21.

113 *Id.*

114 Saint Consulting Group, National Survey: Opposition To Power Transmission Lines, *available at* http://tscg.biz/saintblog/2009/05/national-survey-opposition-to-power-transmission-lines.html.

115 Neither 16 U.S.C. § 824(p), the statute controlling the siting of interstate electric transmission facilities, nor 18 C.F.R. pt. 50, the FERC's corresponding regulation, mention public hearings.

116 James B. Lebeck, *Liquefied Natural Gas Terminals, Community Decisionmaking, and the 2005 Energy Policy Act*, 85 TEX. L. REV. 243, 255–56 (2006). For example, EPAct 2005 does mandate public hearings for the siting of liquid natural gas terminals. 18 C.F.R. § 157.21(f) (2009). Liquid natural gas terminals do, however, cause significantly greater environmental and health risks to locals than do transmission lines. *See generally* Lebeck, 85 TEX. L. REV. at 260–63. (discussing these risks).

117 S. 32, 111th Cong. (2009) (introduced Jan. 6); H.R. 1922, 111th Cong. (2009) (introduced Apr. 2).

118 *Id.*

119 According to their statuses on GovTrack.us as of Mar. 23, 2010. *See* GovTrack.us, Tracking the U.S. Congress, http://www.govtrack.us/ (last visited Oct. 26, 2009).

120 *See* Raab & Susskind, *supra* note 108, at 10.

presence illustrates Congressional concern over the integration of the public in the FERC's interstate transmission facility siting proceedings.

When power companies do attempt to utilize eminent domain under the FPA, courts are likely to look to precedent under the Natural Gas Act (NGA).[121] Upon FERC approval of a project, the power company negotiates its right-of-way with each affected landowner, with the looming power of eminent domain up its sleeve.[122] In this situation, the landowner has little recourse but to settle with the power company. Importantly, in language similar to that of the NGA, Section 216(e)(3) of the FPA states:

> The practice and procedures of any action or proceeding conducted under this subsection in the district court of the United States shall conform as nearly as practicable to the practice and procedures in a similar action or proceeding in the courts of the State in which the property is located.

Consequently, local courts will decide the appropriate procedures for individual eminent domain proceedings, and these will likely resemble those used under the NGA.[123] With state taking laws increasingly diversified since the Supreme Court's holding in *Kelo v. City of New London,*[124] this provision leaves open the question of how eminent domain litigation will unfold under EPAct 2005.[125]

To date, there has been only one request for backstop siting authority to the FERC, and this request was subsequently withdrawn.[126] Consequently, there is little empirical evidence on which to base analysis of the current procedure's efficacy, or the degree to which landowners will have the opportunity to be heard "in a meaningful manner" to satisfy due process. While the FERC's new eminent domain power has not yet been used, it is arguable that the mere threat of federal preemptive power has induced states to be increasingly likely to approve transmission projects under their own

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121 Swanstrom & Jolivert, *supra* note 11, at 452.

122 16 U.S.C. § 824p(e) (2006).

123 71 Fed. Reg. 69,463 (Dec. 1, 2006) (FERC's final ruling, implementing regulations under EPAct 2005).

124 Kelo v. City of New London, 545 U.S. 469 (2005). *See infra* IV.

125 71 Fed. Reg. 69643 (Dec. 1, 2006). "[I]t is for the court to decide what procedures are appropriate for their individual proceedings." *Id.*

126 Application of S. Cal. Edison Co. for Certificate of Pub. Convenience and Necessity to Construct the Devers-Palo Verde No. 2 Transmission Line Project, Cal. PUC (Apr. 11, 2005).

procedures.[127] Although state siting regimes have thus far remained predominant, federal backstop authority represents a step toward greater consideration of regional and national needs, and less consideration of local needs, thus jeopardizing property rights of local landowners.[128]

C. *Bills to Further Expand Federal Authority over Siting of Interstate Transmission Lines*

Limits to the FERC's backstop authority have led many members of Congress to call for even greater federal authority for the siting of interstate transmission lines.[129] Legislators have argued, for one, that federal siting authority may be procedurally beneficial, eliminating the need for interstate projects to navigate bureaucracy caused by the presence of several state siting authorities.[130] Supporters also claim that the FERC, having sited interstate natural gas lines for the past sixty-five years, is the most competent body to handle large-scale transmission projects.[131] Finally, proponents of a more nationalized siting regime charge that state agencies have given too much consideration of NIMBY and other localized concerns, at the expense of weightier national interests.[132] As a whole, this legislation stems from Congressional concern that EPAct 2005 has left too much authority with the states, and thus may not have given the FERC enough authority to facilitate siting approval in certain areas of the country.[133] The bulk of this legislation, however, fails to give proper consideration to the effects increased federal

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127 Swanstrom & Jolivert, *supra* note 11, at 457.

128 Eagle, *supra* note 58, at 43.

129 *See generally* Benedetti, *supra* note 9 (reviewing legislation).

130 *Id.* at 260.

131 *Id.*

132 *Id.* at 260–61.

133 *Transmission Infrastructure: Hearing Before the S. Comm. on Energy and Natural Resources*, 111th Cong. 66–67 (Mar. 12, 2009) (statement of James A. Dickenson, Managing Director and Chief Executive Officer, JEA). *See also* Jim Rossi, *The Political Economy of Energy and its Implications for Climate Change Legislation*, 84 TUL. L. REV. 379, 428 (2009) ("If Congress does not expand FERC's limited authority over transmission planning and siting, parochial state concerns will continue to serve as a barrier to the development of new transmission infrastructure for renewable sources of electric power.").

eminent domain power will have on local landowners, and the inefficiencies and injustices that are likely to accompany it.[134]

In 2009, members of the House and Senate introduced five separate bills aiming to increase federal authority over the siting of interstate transmission lines.[135] Each of these bills, while retaining traditional state siting authority to varying degrees, limits states' discretion in favor of expanding the FERC's authority.[136] For instance, The National Energy Security Act of 2009 ("NESA"), introduced by Senator Byron Dorgan of North Dakota, would replace the FERC's backstop authority with exclusive siting authority over facilities included as part of a FERC-designated "interstate extra-high voltage transmission grid,"[137] deemed the "Clean Energy Superhighway."[138] By taking authority away from those who most directly represent local landowners and thus are incentivized to give more deference to NIMBY and environmental interests, such regulations would undoubtedly reduce the influence of local landowners on the siting of interstate transmission lines.[139]

NESA does, however, address to some extent concerns regarding inclusiveness of landowners in the transmission line siting process and the federal use of eminent domain. While making no substantive changes to EPAct 2005's eminent domain proceedings, NESA would create a "Siting Dispute Resolution Board."[140] Though the FERC would eventually specify how this program would unfold, the bill mandates that the Siting Dispute Resolution Board would at a minimum "ensure appropriate siting within and across the borders of the State" [141] NESA would also require a public hearing open to all interested parties during pre-filing.[142]

Likewise, the National Clean Superhighways Act of 2009, introduced by Representative Jay Inslee of Washington, would create Multistate Transmission Planning Authorities (MTAs) to coordinate in the planning of

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[134] *See* Rossi, *supra* note 5, at 1018–23 (balancing state use of eminent domain for transmission siting, traditionally more deferential to private property rights, against federal siting authority, more focused on national energy policy).

[135] Beneditti, *supra* note 9 (reviewing these bills).

[136] *Id.* at 268.

[137] NESA, S. 774, 111th Cong., § 101 (2009).

[138] *Id.*

[139] *See* Benedetti, *supra* note 9, at 260 (describing discrepancy between local and federal authorities' considerations in siting transmission lines).

[140] NESA, S. 774, 111th Cong. § 101(d)(2)(B)(xi) (2009).

[141] *Id.* § 101(d)(3)(B)(i). One representative of FERC, one state representative, and another independent expert would comprise the Board. *Id.* § 101(d)(3)(B)(ii).

[142] *Id.* § 101(d)(8)(B)–(C).

the national transmission grid.[143] This bill would supplement the FERC's current backstop authority, allowing the MTAs, in coordination with the FERC, to supersede state siting authority.[144] Notably, this bill calls for "[a]n open, transparent, and participatory [sustainable transmission grid] planning process, including public hearings."[145] Another bill, the American Clean Energy Leadership Act of 2009 (Senator Jeff Bingaman (NM)) would mandate that the FERC "shall provide notice to interested persons and opportunity for hearing."[146]

Senator Ben Nelson's (NE) Sound Management of America's Resources and Technologies Energy Act ("SMART" Energy Act), lacks public inclusiveness provisions almost completely.[147] Similarly to NESA, the SMART Energy Act would create an energy superhighway, over which the FERC would have exclusive siting authority.[148] While the bill would require the FERC to consider "input from all interested parties," it does not specifically discuss how it would account for input from states or from citizens whose property would be condemned.[149] The SMART Energy Act authorizes the FERC to use eminent domain in certain circumstances,[150] but includes no provisions authorizing dispute resolution services or public hearings.

Each of these bills aims "to address the problem of state and local governments withholding the power of eminent domain for new transmission lines."[151] By virtue of taking power away from local authorities most likely to

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[143] NCESA, H.R. 2211, 111th Cong. § 101 (2009) (amending Part II of the Federal Power Act).

[144] *Id.* (proposed amendment to § 216A(b)(3) of the Federal Power Act).

[145] *Id.* (proposed amendment to § 216A(b)(1)(B)(ii) of the Federal Power Act).

[146] *Id.* (proposed amendment to § 216(e)(1)(C)(i) of the Federal Power Act).

[147] SMART Energy Act, S. 807, 111th Cong. (2009); *see also* Benedetti, *supra* note 9 (comparing the five bills).

[148] *See* SMART Energy Act, *supra* note 147, § 101 (proposed amendment to § 224(c) of the Federal Power Act).

[149] *Id.* (proposed amendment to § 224(d)(1)(C)(i) of the Federal Power Act); *see also* Benedetti, *supra* note 9, at 263–64 (summarizing SMART Energy Act and its expansion of FERC's siting jurisdiction).

[150] SMART Energy Act, *supra* note 147, § 101 (proposed amendment to § 224(e)(2) of the Federal Power Act). This would authorize FERC to use eminent domain for secondary line connections, defined to include new transmission lines built to connect to the Energy Superhighway, or existing transmission lines rerouted or otherwise modified to connect to the Energy Superhighway. *Id.* (proposed amendment to § 224(b)(5) of the Federal Power Act).

[151] Rossi, *supra* note 5, at 1039.

account for provincial issues such as private property rights and environmental considerations, each of these bills would be likely to alienate local landowners from the siting process. Provisions mandating public hearings or dispute resolution services, while to an extent mitigating this problem, do not adequately mitigate disputes arising from eminent domain, the inefficiencies associated with these disputes, or account for their bearing on due process.[152]

IV. EMINENT DOMAIN REFORM LAWS AND INTEGRATION OF THE PUBLIC

A. Kelo *and the Definition of "Public Use"*

With individual states usually retaining their role as final arbiters of eminent domain power, the issue of whether a given transmission project represents a bona fide "public use" may increasingly affect eminent domain grants to private utilities. Even in light of EPAct 2005, states that have traditionally refused to consider interstate benefits in their siting decisions may remain unlikely to grant eminent domain to a power company whose project will primarily benefit citizens of other states.[153] Currently, this is particularly relevant for the majority of the country that does not fall under the FERC jurisdiction for the purposes of transmission line siting.[154] The question of the reach of states' eminent domain power has burst into the public spotlight since the United States Supreme Court's 2005 holding in *Kelo v. City of New London.*[155] In *Kelo*, the Court found the City of New London's taking of private property to redevelop its waterfront area "to increase tax and other revenues and to revitalize an economically distressed city" a legitimate public use, constitutional under the Fifth Amendment.[156] This holding, that for a purpose only questionably public, a person's private

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[152] *See infra* Part V.

[153] Eagle, *supra* note 58, at 40; *see also* Rossi, *supra* note 5, Section II.B.

[154] *See supra* Part III.B.

[155] Kelo v. City of New London, 545 U.S. 469 (2005). *See* Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 652 (2008) (discussing the emergence of passionate public interest in eminent domain doctrine).

[156] *Kelo*, 545 U.S. at 472, 484.

property could be condemned and transferred to another owner for development and private profit, caused a great deal of public outrage.[157]

Within merely two years of the *Kelo* holding, forty-four states responded by enacting some form of eminent domain reform legislation, resulting in possibly more new state legislation than any Supreme Court decision in history.[158] Critical to much of this legislation was the narrowing of the framework of what constitutes a permissible public use for eminent domain purposes.[159] Because the *Kelo* Court did not impose a bright-line rule over what constitutes a public purpose consistent with the Fifth Amendment, but left this authority to local decisionmakers, discrepancies remain across states' definitions of "public use."[160]

While *Kelo* brought increased attention and a proliferation of commentary on the extent to which takings providing private benefits may be considered "public use," the question of whether the "public" may include out-of-state residents varies across states.[161] State eminent domain reforms left intact the interstate disparities among states' permission of eminent domain for transmission projects that would primarily benefit citizens of neighboring states.[162] As such, while federal backstop permitting has encouraged states to consider regional benefits in approval of transmission projects, those states that have been traditionally reluctant to do so may remain so.

B. *Eminent Domain Procedural Reform*

In addition to considering the degree to which the public would benefit from the urban redevelopment project, key to the *Kelo* Court's decision was the degree to which the public was integrated into the decisionmaking

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157 *See* Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709 (2006) (discussing the public anger and subsequent state reforms arising from *Kelo*).

158 *See also* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2101 (2009) (weighing the merits of states' post-*Kelo* eminent domain reforms).

159 *See* National Conference of State Legislatures, Eminent Domain, http://www.ncsl.org/default.aspx?tabid=13252 (last visited Mar. 22, 2010).

160 *Kelo*, 545 U.S. at 482–83, 483 n. 11 ("[O]ur jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances.").

161 *See generally* Rossi, *supra* note 5, at 1018–23.

162 *See generally* Eagle, *supra* note 58.

process through public hearings, environmental and social reviews, and alternative analyses.[163] Both the majority opinion and Justice Kennedy's concurrence underscored the participatory nature of the City of New London's planning process as evidence that it genuinely served a public use.[164] Indeed, commentators have suggested that participatory planning may help legitimize takings whose public purpose may be otherwise questionable.[165]

While much commentary has focused on the eminent domain reform laws' limitations of the definition of "public use," several of these reforms have included procedural reform expanding public notice and participatory requirements as well.[166] For instance, Utah enacted S.B. 317, requiring that the legislative body in the relevant city or county approve each taking by vote and that each owner of land subject to condemnation be personally informed of the meeting and provided the opportunity to be heard.[167] Additionally, condemning entities must make an effort to negotiate with each property owner in good faith, and advise property owners of rights to mediation and arbitration.[168]

While not all of these reforms have included utilities in their heightened procedural hurdles, they represent powerful evidence of the consequences of the public's rising concern for the protection of property rights. Even prior to *Kelo*, a number of states' eminent domain procedures already included requirements of public notice and good faith negotiations, along with such opportunities for public participation as public hearings.[169] Viewed

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[163] Klass, *supra* note 155, at 692–93 (citing *Kelo*, 545 U.S. at 483–84); *see also* *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring that "[T]he city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes.").

[164] *Kelo*, 545 U.S. at 483 (majority opinion), 545 U.S. at 493 (Kennedy, J., concurring).

[165] Nicole Stelle Garnett, *Planning as Public Use?*, 34 ECOLOGY L.Q. 443, 454 (2007) (assessing the potential influence of the *Kelo* Court's emphasis on participatory planning on future condemnations).

[166] For overview, see Nat'l Conf. of State Legislatures, Eminent Domain, http://www.ncsl.org/default.aspx?tabid=13252 (last visited Mar. 22, 2010). At least seven states passed legislation expanding public participation opportunities and mandating good faith negotiations between 2005 and 2007. *Id.* For a summary of each of these laws, see Appendix. *See also* Somin, *supra* note 158.

[167] UTAH CODE ANN. § 78B-6-504 (2008).

[168] *Id.* § 78B-6-505.

[169] *See, e.g.*, N.Y. EM. DOM. PROC. Law § 101 (McKinney 2006) (The Eminent Domain Procedure Law's purpose is to "to assure that just compensation shall be paid . .

holistically, Supreme Court precedent from *Kelo* and the enhanced participatory requirements present in much state legislation reflect that increased social and judicial concern has been placed on the integration of the public in eminent domain proceedings.[170]

C. *How Will Recent Eminent Domain Reforms Affect Transmission Line Siting?*

1. *Higher Procedural Hurdles in State Laws*

In light of *Kelo*, state legislators have enacted procedural reforms to eminent domain to give the degree and character of public participation an increasingly prominent role in the success of condemnations. While courts have customarily granted utilities substantial deference as to their takings procedures,[171] the *Kelo* opinion and its accompanying legislative backlash should urge courts to place greater capital into condemnors' integration of landowners when adjudicating eminent domain cases for transmission line projects.

In Wyoming, for example, recent eminent domain reform sought to raise the low bar which electric companies and other condemnors had historically enjoyed as to their interactions with the public.[172] Like most states, Wyoming has traditionally been quite hesitant to question electric companies' chosen routes for transmission lines and the quality of their negotiations with landowners, as highlighted by its Supreme Court's recent holding in *Bridle Bit Ranch Co. v. Basin Electric Power Cooperative.*[173] Here, despite

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. to establish [an] opportunity for public participation in the planning of public projects necessitating the exercise of eminent domain; to give due regard to the need to acquire property for public use as well as the legitimate interests of private property owners, local communities and the quality of the environment, and to that end to promote and facilitate recognition and careful consideration of those interests; to encourage settlement of claims for just compensation and expedite payments to property owners . . . and to ensure equal treatment to all property owners.").

[170] *See* Nasim Farjad, Note, *Condemnation Friendly or Land Use Wise? A Broad Interpretation of The Public Use Requirement Works Well for New York City*, 76 FORDHAM L. REV. 1121 (2007) (arguing that procedural reform, rather than prohibitive legislation, would best prevent unjust private takings).

[171] For review, see Mohr, *supra* note 44, at 201–02.

[172] WYO. STAT. ANN. § 1-26-509 (2007).

[173] Bridle Bit Ranch Co. v. Basin Elec. Power Coop., 118 P.3d 996 (Wyo. 2006) ("[T]he courts have been quite reluctant to overturn a site determination by a power company unless the evidence clearly established an unreasonable disregard of individual or public interests.") (citing Annotation, *Eminent Domain: Review of Electric Power*

allegations that a company had pre-selected the route of its transmission lines prior to negotiating it with the landowners,[174] and the fact that Wyoming's eminent domain law at the time did in fact suggest that condemnors negotiate in good faith with landowners, the Court quickly dismissed claims that the condemnor's negotiations failed the good faith standard.[175]

Since *Bridle Bit* was decided, the Wyoming legislature has amended the state's eminent domain act to mandate, rather than merely suggest, good faith negotiations.[176] As part of "good faith negotiations," the new Wyoming standard includes expanded notice requirements, more rigid timelines, and orders the condemnors to offer to tour each disputed property with its respective condemnee.[177] While these provisions may not have changed the outcome in the *Bridle Bit* case,[178] courts will undoubtedly incorporate the 2007 law's more exacting standards into future condemnation hearings, allowing landowners earlier and more extensive involvement in the siting decisions. This mirrors the judicial sentiment favoring enhanced public participatory proceedings emerging from the *Kelo* case,[179] as well as recent trends from state legislatures.[180]

Still, the Supreme Court of Wyoming's position with respect to the power companies' duties as condemnors echoes a sentiment common throughout U.S. courts, that as nearly per se bona fide vehicles of public use, utilities generally have more power to infringe upon landowner rights than do other types of condemnors.[181] As such, some states, while promulgating restrictive legislation on the use of eminent domain by private entities and

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Company's Location of Transmission Line for Which Condemnation is Sought, 19 A.L.R. 4th 1026, 1030–31 (1983 Supp. 2004)).

[174] Brief for the Petitioners, *Bridle Bit Ranch Company, a Wyoming Corp.; Jerry and Barbara Dilts Family*, 24–25, Bridle Bit Ranch Co. v. Basin Elec. Power Coop., No. 04-134, 2006 WL 3845041.

[175] *Bridle Bit*, 118 P.3d at 1015–16.

[176] WYO. STAT. ANN. §§ 1-26-509(c)–(h) (2007) (specifying a timeline and steps condemnors must follow to satisfy the good faith requirement). For comprehensive review of changes, see 2007 Wyoming Laws Ch. 139 (H.B. 124).

[177] *Id.* §§ 1-26-509 (c)–(h) (2007).

[178] In *Bridle Bit*, the power company had been negotiating with some landowners for over a year, and by the day of trial had settled with approximately 82% of them. The company also kept extensive records of its negotiations with all landowners. *Bridle Bit*, 118 P.3d at 998, 1015–16.

[179] *Kelo*, 545 U.S. at 483 (majority opinion), 545 U.S. at 493 (Kennedy, J., concurring).

[180] *See supra* note 106.

[181] *See generally* Mohr, *supra* note 44.

subjecting them to increased procedural requirements, have exempted public utilities in these laws. For instance, Minnesota's eminent domain law requires that a condemning authority provide both public and individual notice of its proposed taking and "make a good faith attempt to negotiate personally with the owner of the property in order to acquire the property by direct purchase instead of the use of eminent domain proceedings."[182] However, as "public service corporations," gas and electric utilities are exempt from these expanded public participatory requirements, thus enjoying greater judicial deference than would the majority of takers.[183]

Many states have, nonetheless, made steps toward public inclusiveness in procedures for condemnation for the construction of transmission lines. Missouri's reform, for example, subjects utilities, along with all potential condemning entities, to identical public notice and good faith negotiation requirements.[184] Likewise, Utah's law implicates nearly every conceivable taker, including those constructing "electric light and power lines, and sites for electric light and power plants," in its procedural requirements that property owners be given ample notice, the opportunity to be heard at a public meeting, and negotiation in good faith.[185]

Georgia's reform, however, represents the most direct result of public dissatisfaction with the manner in which some public utilities exercise their takings power.[186] In response to "the perceived arrogance on the part of the utilities in taking land," Georgia enacted H.B. 373, implementing increased procedural hurdles specifically for utilities in condemning property to build power lines.[187] This law requires that, in siting transmission lines, Georgia utilities negotiate in good faith with each affected property owner and hold a number of public meetings where they provide information about the lines, show alternative routes they considered, and provide an opportunity for public comment.[188] Enacted even prior to *Kelo*, this law provides evidence both that discontent with condemnation power extends well beyond private

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[182] S.F. No. 2750, 84th Sess. (Minn. 2006). Notice requirements are in MINN. STAT. § 117.055 (2006). Negotiation provisions are found in MINN. STAT. § 117.036 (2006).

[183] MINN. STAT. § 117.025(10) (2010) (defining public service corporation); *id.* § 117.189 (exempting these entities from notice and negotiation requirements).

[184] MO. REV. STAT. § 523.256 (2006).

[185] UTAH CODE ANN. § 78B-6-501 (2008).

[186] *See* Sarah Elizabeth Tosone, *Condemnation Procedures: Change The Time For Hearing Before A Special Master And To...*, 21 GA. ST. U. L. REV. 157 (2004) (discussing the passage of Georgia H.B. 373).

[187] GA. CODE ANN. § 22-3-160(a) (2010).

[188] *Id.*

development takings, and that this tension may be in part offset by better integration of the public.[189] In addition to providing more procedural hurdles requisite for condemnation, laws such as these bring increased public scrutiny to the taking process, thereby deterring condemnors from using their takings power in any way that the public could view as callous.[190]

However, commentators have argued that the increased due process and procedural justice sought by many post-*Kelo* reforms will not occur. In fact, of the forty-four total state reforms, a recent article classified only twenty as truly providing "property owners with at least some significant protection against economic-development condemnations beyond that available under preexisting law."[191] While that article limited the scope of its discussion to economic-development takings, it powerfully illustrates many of these reforms' failure to provide meaningful change. The article characterizes several of these reforms aimed to better integrate the public as only "minor procedural protections" that fail to alter what are essentially unjust takings.[192] Rather bluntly, another commentator has argued that "insulating an injustice with bureaucratic procedural requirements simply cannot transform it into a just act."[193] Ultimately, while enhanced public participatory procedures may in some cases increase due process and procedural justice, the consistency with which such reforms may actually effectuate these goals remains uncertain.

2. *Potential Effects of EPAct 2005 on States' Scrutiny*

While *Kelo*-era state eminent domain reform laws have given increased attention to landowners' roles in condemnation proceedings, federal intervention under EPAct 2005 will further complicate this picture. On one hand, via the Act's requirement that condemnors implement Public Participation Plans meant to maximize the information made available to landowners and their opportunities to participate, the FERC has made clear

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[189] Tosone, *supra* note 186, at 164.

[190] Gregory S. Knapp, Note, *Maintaining Government Accountability: Calls for a "Public Use" Beyond Eminent Domain*, 83 IND. L.J. 1097, 1115 (2008).

[191] Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2114 (2009).

[192] *Id.* at 2131 (describing Delaware's reform bill, codified at DEL. CODE ANN. tit. 29, § 9501A (2009)).

[193] Sandefur, *supra* note 157, at 731.

that it intends to improve the public's integration in the condemnation process.[194]

On the other hand, much evidence calls into question the degree to which this ideal will be implemented in practice. First, any analysis of this issue must emphasize the fact that, like the NGA, the very purpose of EPAct 2005 was to foster a legal atmosphere facilitative to the efficient siting of energy projects, especially to projects that transcend state boundaries.[195] Consequently, there is compelling reason to expect that by and large, the FERC will administer takings for both electric and gas lines similarly.[196] Under the NGA, utilities holding the FERC's blanket certificates have generally enjoyed deference from courts in eminent domain decisions.[197] The FERC's public integration practices historically employed under the NGA, while in some cases successful in giving voice to members of the public, are unlikely to effectively integrate these views into actual decisions.[198] Instead, the process merely gathers opinion without facilitating consensus-building.[199]

Regardless, because the FERC holds only backstop jurisdiction, it thus far has seldom played a direct role in the transmission line siting process.[200] However, as investment in transmission infrastructure continues to increase, so does the likelihood that local property interests will conflict with nationwide energy goals, thus providing impetus for FERC to wield its jurisdictional power. Rather than direct intervention, however, "the mere threat of federal preemption may influence states' behavior by inducing them

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194 18 C.F.R. § 50.4 (2009).

195 Swanstrom & Jolivert, *supra* note 11, at 452.

196 *Id.* The FPA does include some minor specifications providing tighter control over the takings process than is present under the NGA. For example, while the NGA provides no specific standard to determine the amount of compensation to be paid landowners, the FPA specifies that, "[J]ust compensation shall be an amount equal to the fair market value (including applicable severance damages) of the property taken on the date of the exercise of eminent domain authority." 16 U.S.C. § 824p(f)(2) (2006). However, given these Acts' similar purpose, commentators have concluded that their actual takings processes will be generally similar. *See* Swanstrom & Jolivert, *supra* note 11, at 454.

197 *See generally supra* Part II.

198 Jonathon Raab & Lawrence Susskind, *New Approaches to Consensus Building and Speeding up Large-Scale Energy Infrastructure Projects* 5, http://web.mit.edu/dusp/epp/pdfs/New_Approaches_Consensus_Building.pdf (last visited Mar. 25, 2010).

199 *Id.*

200 Swanstrom & Jolivert, *supra* note 11, at 466.

to approve more projects or act more quickly on applications."[201] Further, the chorus of calls for amendment to EPAct 2005 to expand FERC's siting power may increase the tension between states' concern for local property interests and national energy policy goals.[202]

With disparate state eminent domain procedures in place, the ultimate effect that increased investment in electric transmission will have on individual landowners remains to be seen. For instance, one can only speculate as to how the looming FERC power will affect states whose traditional permitting of transmission lines was rooted in parochialism.[203] It is similarly unclear how FERC's power will affect states whose procedures as to landowner involvement in condemnation proceedings has not been made explicit, as well as how FERC's background presence will affect district courts' construction of states' newly heightened procedural requirements. A distinct possibility is that states reluctant to turn over jurisdiction to FERC may be incentivized to approve projects on their own.[204] Thus, in spite of an array of state provisions aimed to protect landowners from unjust takings, the multitude of factors playing into state transmission sitings leaves these landowners' procedural roles and rights uncertain.

V. THE IDEAL PUBLIC ROLE IN THE SITING OF TRANSMISSION LINES: BALANCING JUSTICE AND EXPEDIENCE

Upon taking office, President Obama assured the American people that his Presidency would usher in an era of "transparency and open government."[205] Via public memorandum, Obama instructed agency leaders that government should be transparent, participatory, and collaborative.[206] While this goal is commendable in the abstract, this may be difficult to implement in practice. The siting of interstate transmission facilities, however, offers an opportune context to engage the public to sufficiently

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[201] *Id.* at 457. Note however, that FERC may not reverse a state agency's outright denial of a siting application. Piedmont Envntl. Council v. F.E.R.C., 558 F.3d 304, 313–14 (4th Cir. 2009).

[202] *See supra* Part II.C.

[203] Again, states may not consider out-of-state benefits in determining whether a project meets the public use requirement for the exercise of eminent domain. *See* Eagle, *supra* note 58, at 25.

[204] *Id.*

[205] Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009).

[206] *Id.*

address the Obama ideal. Such a process, able to improve the quality of decisions made and help legitimize the expansion of federal jurisdiction, must be designed so as to avoid inefficiencies associated with excessive public integration.

To successfully modernize the national electric transmission grid, regulators must account for the effects of its expansion on landowners whose property it will cross. To do so, Congress should amend EPAct 2005 to improve the FERC's integration of the public through consensus-building procedures: bringing procedural justice to landowners affected by the construction of interstate transmission lines, while at the same time creating a more efficient siting process.

To best accomplish these potentially conflicting goals, Congress should create a program encouraging public participation in siting proceedings, but primarily via neutral third-party mediators. Broadly defined, mediation is a process by which a neutral third person facilitates interested parties in arriving at a mutually acceptable solution to a controversy.[207] Such a program would be able to accommodate any pending broader revisions of the current protocol for siting interstate transmission lines.[208] Mediation has been highly successful when applied to land use disputes, so much so that one study reported 86% of those participating in mediated land use dispute resolution processes reacting to it favorably, with 85% believing that the mediator played a critical role in contributing to the process's success.[209] In addition to increasing participants' satisfaction, mediated land use agreements are also likely to be more efficient than traditional alternatives. For instance, the study also found that 91% of participants, including government officials, reported that the process cost less, and 81% stated that the process took less time than more adversarial, conventional alternatives.[210]

In authorizing mediation, Congress should require that any utility siting a transmission line under federal jurisdiction first hold at least one public hearing in each county where the transmission line would be located, allowing all members of the public the opportunity to comment.[211] This public hearing should take place early on, contemplating integration of the

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[207] JOHN R. NOLON, WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH 429 (Evntl. Law Inst.2001).

[208] *See supra* Part III.C (discussing pending amendments to EPAct 2005).

[209] LAWRENCE SUSSKIND, OLE AMUNDSEN & MASAHIRO MATSUURA, USING ASSISTED NEGOTIATION TO SETTLE LAND USE DISPUTES: A GUIDEBOOK FOR PUBLIC OFFICIALS 3 (1999).

[210] *Id.* at 19–23.

[211] *See* GA. CODE ANN. § 22-3-160–162 (2004).

public as early as possible in the planning process.[212] Further, EPAct 2005 should be amended to require that utilities attempt to conduct good faith negotiations with landowners before engaging in any eminent domain proceedings.[213] Congress should similarly require affected landowners to attempt to negotiate with the utility in good faith.[214] Finally, Congress should allow landowners to initiate mediation by request at any time during deliberations.[215] For the common situation in which multiple landowners share identical interests, the FERC should allow the utility to consolidate landowners' claims for the purposes of siting negotiations and deliberations, with a third-party neutral acting as mediator on behalf of both parties.[216]

Such a program would give a genuine voice to landowners similarly affected by the siting of interstate transmission facilities, without impeding planners' practical need for expedience. This procedure would provide a number of benefits to the siting process, potentially improving the quality of deliberations, conferring increased legitimacy on an otherwise undemocratic process, and a quicker, more satisfactory means of resolving disputes.

A. *Public Participation Can Improve the Quality of the Decisionmaking Process*

Public participation allows agencies to better understand affected citizens' preferences.[217] When members of the public are genuinely involved in agency decisionmaking, as opposed to playing the role of outside commentators, decisionmakers are encouraged to "actually listen" to their viewpoints.[218] An integrative process, in addition to voicing their personal preferences, broadens the scope of information available to

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212 Raab & Susskind, *supra* note 198, at 8.

213 For an overview of states' requirements that would-be condemnors must adhere to, see Appendix.

214 For example, Wyoming's eminent domain law requires that "[a] condemnee shall make reasonable and diligent efforts to negotiate in good faith with the condemnor including a timely written response to the written offer [by the utility to purchase his land] specifying areas of disagreement." WYO. STAT. ANN. § 1-26-509(c)(iii)(f) (2007).

215 Both Wyoming's and Utah's eminent domain laws contain such provisions. WYO. STAT. ANN. § 1-26-509(h) (2007); UTAH CODE ANN. § 78B-6-522 (2008).

216 *See infra* Part V (describing this procedure).

217 Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 185 (1997) (weighing costs and benefits of public participation in agency decisionmaking).

218 *Id.*

decisionmakers.[219] Agencies, often criticized for acting too hastily and without enough information, may in some contexts be able to ameliorate this challenge by broadening their information base.[220] Of course, public participation allows information not only to flow from citizens to decisionmakers, but to the wider public as well.[221] Consequently, a better-informed public may be able to cooperate with public officials more effectively, facilitating a more efficient decisionmaking process.[222]

With respect to the siting of interstate transmission facilities, a siting process consisting solely of experts may be unable to accurately assess landowner value judgments. For instance, while experts may be able to precisely pinpoint health risks that transmission lines pose to residents, they are unlikely to satisfactorily account for citizens' less technical objections, such as aesthetic concerns, degree of decline in property value, or concern that the neighborhood could become a future brownfield.[223] Members of the public may be able to fill the gaps that information provided solely by utilities would inevitably leave.[224] Thus, integration of affected landowners into the decisionmaking process would allow officials to better account for their preferences—a consideration that should in any event weigh heavily on the siting process.

B. *Public Participation will Help Legitimize the Expansion of Federal Jurisdiction over the Siting of Transmission Lines*

A Department of Energy-commissioned study of the national electric grid described the public trust in the transmission siting process as "crucial and volatile" to its success, exhorting managers of the process to act in a manner to maintain the public's confidence.[225] Greater integration of the public would help to achieve this end by making agency decisionmaking more accountable to the public and subject to institutional oversight.[226] Particularly in the federal system, agencies are not directly linked to any

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219 *Id.* at 186.

220 *Id.*

221 *Id.* at 187.

222 Rossi, *supra* note 218, at 187.

223 *Id.* at 198.

224 Meyer & Sedano, *supra* note 12, at E-3.

225 *Id.* at E-6.

226 Rossi, *supra* note 217, at 182–83.

majoritarian political process because their officials are unelected.[227] When these officials oversee the government taking of privately owned land, this creates a unique challenge to the democratic ideal, as landowners have little influence, practically or even theoretically, over their appointment. The widespread push for increased accountability and public participation opportunities in state eminent domain procedures evidences citizens' desires to be involved in decisions relating to their property and communities.[228]

Using eminent domain only as the last resort, and attempting to first engage the public in participatory planning, often avoids the need for condemnation, and lends it legitimacy when it does occur.[229] Literature suggests that this "legitimacy benefit" already occurs when applied to regulatory negotiations under the Environmental Protection Agency.[230] Here, empirical studies have found that public participation reduces conflict and yields increased satisfaction from participants in both the procedure and results of collaborative rulemaking.[231]

A citizen who faces a government condemnation of his land, supervised by a federal agency, and primarily for the benefit of citizens of a neighboring state, is naturally likely to perceive the taking as unjust. Since the *Kelo* decision and in light of states' eminent domain reform laws, courts in many states may be similarly hesitant to authorize eminent domain under such circumstances. However, the *Kelo* Court did suggest that "public, participatory planning is a constitutional safe harbor" lending legitimacy to takings and thus protecting condemning entities from some challenges by landowners.[232] With respect to economic development takings, municipal governments are more likely than ever before to design comprehensive and participatory planning efforts to avoid conflict with state eminent domain

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227 *Id.*

228 *See supra* Part IV.B.

229 Garnett, *supra* note 165, at 461–65.

230 *Id.* at 463–64 (reviewing literature). *See* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 62, 67, 80, 109–10 (2000) (discussing comprehensive study of EPA's negotiated rulemaking process, which found that negotiations reduce conflict and increase participant satisfaction and commitment to results).

231 Freeman & Langbein, *supra* note 230.

232 Garnett, *supra* note 165, at 444; *see also* Meyer & Sedano, *supra* note 12, at E-11 (stating that parties other than utilities are more likely to feel that an open or transparent siting process has respected their interests).

reform laws.[233] Utilities, however, have not historically been inclined to genuinely allow the citizenry much influence over their siting decisions.[234] In light of the FERC's impending increased jurisdiction over the transmission siting process, and thus its likely decline in legitimacy in the public eye, a participatory planning process should similarly help avoid conflict with more parochial state laws.[235] Even in cases where the FERC is subordinate to state-level jurisdiction, a FERC practice requiring public participation would incentivize utilities to integrate landowners, in anticipation of utilizing FERC's backstop jurisdiction later on.[236] Thus, federally administered participatory planning would raise the federal siting process's legitimacy, helping to hedge against disparities in state eminent domain laws.

C. *The Public Should Not Be Integrated in a Manner that Would Impede the Efficiency of the Decisionmaking Process*

Critics have long argued that the process for siting transmission lines "has become unnecessarily cumbersome, delay prone, and subject to breakdown"—a concern particularly apposite for lines crossing state boundaries.[237] As such, if taken to excess, broad public integration may both delay and hamper the quality of agency decisions.[238] Beyond mere inclusiveness, a fundamental goal of participatory proceedings is to raise the quality of discussion and decisions.[239] While public participation encourages breadth in decisionmaking procedure, it may in some cases discourage the

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[233] Brandon Simmons, *Kelo's Planning Mandate: Replacing Clarity with Complication*, 43 REAL PROP. TR. & EST. L.J. 139, 167 (2008) (arguing that judicial requirements of public participatory planning will add confusion to takings jurisprudence, because it will require courts to examine complicated, political areas in which they have little expertise).

[234] Mohr, *supra* note 44, at 201–02.

[235] For an example of this process leading to a successful siting of interstate transmission lines, see Meyer & Sedano, *supra* note 12, at E-32 n.38. Here, Meyer and Sedano describe how the Kansas Corporation Commission approved a segment of a transmission project despite its lack of benefit to Kansas, based upon an open participatory process. *Id.*

[236] Swanstrom & Jolivert, *supra* note 11, at 457.

[237] Meyer & Sedano, *supra* note 12, at E-1.

[238] *See generally* Rossi, *supra* note 217, at 212–37 (exploring the relationship between the breadth of public participation and the quality of deliberation).

[239] *Id.*

deep deliberation necessary for high quality decisions.[240] Thus, designers of any siting process seeking to further integrate landowners must be careful to ensure that doing so will neither reduce its efficiency or quality.

For one, an influx of angry landowners into siting proceedings may impair decisionmakers' abilities to discuss items without fearing backlash from the public, forcing superficial or disingenuous discussion.[241] Further, additional stakeholders are likely to bring a greater quantity, though not necessarily quality, of information, potentially leading to an "information overload" that would encourage a less thorough analyses of issues and alternatives.[242] Similarly, a greater number of participants would surely, at least in some cases, lead to redundancies in information discussed, and thus to inefficiency.[243] Further still, the scope of these projects, many of which would pass through multiple states, renders wholly integrative decisionmaking simply impossible.[244] Because doing so would be impractical, and in any event not advantageous, FERC's procedural structure should not allow *all* affected landowners to participate directly.

However, an improved integration of the public would facilitate higher quality decisionmaking as well as more efficient resolution of disputes.[245] Utilities' failures to appropriately address disputes have in many cases resulted in substantial delays, and sometimes failures, to site transmission projects.[246] While federal assertion of jurisdiction over the siting of interstate projects will in some cases help expedite the siting process, any process that fails to address the concerns of affected landowners will be subject to similar difficulties.[247] In contrast, a recent government study found open planning,

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[240] *Id.*

[241] *Id.* at 216.

[242] *Id.*

[243] *Id.*

[244] Lebeck, *supra* note 116, at 255–56 (discussing the balance of local and national interests in the decionmaking process for locating liquid natural gas terminals under EPAct 2005).

[245] Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions Installment Two*, 24 STAN. ENVTL. L.J. 269, 271 (2005) (arguing that participatory planning may generate fairer, better planned, and more efficient land use agreements). *See also* NOLON, *supra* note 207, at 430 (stating that early use of mediation can prevent disputes, while later use can resolve them).

[246] Eagle, *supra* note 58, at 25.

[247] *Id.* at 25–26 n. 208 (citing cases where local anger hampered the siting process). *See also supra* Part III.

with utilities soliciting interested parties' views early on, a "critical element of success."[248] For instance, a case study examining a four-state transmission siting found "the applicant's proactive anticipation of and responsiveness to landowner and community concerns" essential to its success.[249] To be effective, however, utilities should not merely inform landowners of their plans, but rather should seek to settle issues and reach consensus.[250]

To successfully move beyond stagnant deliberation and toward consensus-building, all parties would benefit from the use of mediation.[251] Such a mechanism, allowing but forcing limits on participation, would encourage representative, deliberative decisionmaking while avoiding inefficiencies inherent in indiscriminate, immediate participation.[252] As outlined below, mediation would successfully balance the government's goal of streamlining the siting of interstate transmission facilities, while yielding just, high quality decisions.

VI. A LANDOWNER-UTILITY MEDIATION MODEL

A. *Normative Characteristics of the Mediation Model*

A FERC-supervised program where landowners and utilities can resolve disputes regarding the construction of interstate transmission facilities through mediation would provide greater justice and efficiency than the FERC's current procedure. Mediation could resolve a number of difficulties extant in the present system where federal permitting is at odds with state eminent domain powers.[253] Given the heightened attention to eminent domain brought by the Supreme Court's decision in *Kelo*, disparate state procedural requirements, and the sheer number of property owners implicated in interstate projects, condemnation processes under EPAct 2005 will often be extremely protracted.[254] If enacted, current proposals for further expansion of FERC's authority are not likely to resolve this difficulty, but rather to lead to

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[248] Meyer & Sedano, *supra* note 12, at E-11.

[249] *Id.* at E-10 (discussing Xcel Energy's building of a 300-mile, 345 kv line connecting a substation in Amarillo, Texas to a substation near Lamar, Colorado).

[250] Raab & Susskind, *supra* note 198, at 15.

[251] *Id.*

[252] Rossi, *supra* note 217, at 245.

[253] Eagle, *supra* note 58, at 38.

[254] David B. MacGregor & Matthew J. Agen, *Shortcut or Short Circuit: Transmission Line Siting Under EPAct*, PUB. UTIL. FORTNIGHTLY, Aug. 2007, at 42.

even heavier use of eminent domain, potentially unleashing public backlash against these takings. Structured effectively, a federally-authorized mediation process would increase both due process to landowners and efficiency in the siting process.

To be successful, any multilateral land use dispute resolution model should present clear advantages to FERC's current model. To do so, the mediation model should afford landowners the ability to participate in a meaningful way, through a collaborative problem-solving orientation.

1. *The Need for Meaningful Participation*

While the FERC's process does currently mandate the inclusion of interested landowners in the siting of interstate transmission lines, it does not do so early enough or through procedure likely to lead to meaningful involvement. As such, it fails to grant landowners the "opportunity to be heard . . . at a meaningful time and in a meaningful manner" that is necessary to fulfill due process.[255] Generally speaking, utilities will only allow public involvement because doing so is required by law, and will attempt to do the least possible in order to satisfy the legal standard.[256] This approach, rather than fostering the participatory government envisioned by President Obama,[257] will "rarely afford interested parties any meaningful participation in negotiating specifics of large-scale developments."[258]

Instead, landowners should, through mediation, have a meaningful role in determining how the transmission project unfolds. To accomplish this, affected landowners should be notified and integrated "once a need has been recognized but before a solution is selected."[259] Utilities should present landowners with alternatives to their desired projects, and attempt to illustrate that they intend to complete the project in the best way possible,

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[255] Denver Welfare Rights Org. v. Pub. Utils. Comm'n, 547 P.2d 239, 247 (Colo. 1976) (en banc).

[256] Raab & Susskind, *supra* note 198, at 10.

[257] Memorandum on Transparency and Open Government, *supra* note 205.

[258] Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement, and Adaptive Planning in Land Use Decisions Installment One*, 24 STAN. ENVTL. L.J. 3, 37–38 (citing Daniel R. Mandelker, LAND USE LAW 2–51 (5th ed. 2003)).

[259] Meyer & Sedano, *supra* note 12, at E-32.

rather than simply focusing on getting a particular project completed.[260] A wide array of options would be discussed, and members of the public would be able to be involved throughout the process. Allowing the public to understand and provide input as to the relative merits of alternative projects would dramatically increase the substance of public participation, currently in need of improvement.[261]

2. *A Collaborative, Problem-Solving Orientation*

To best facilitate consensus, public participation must take place cooperatively, rather than adversarially.[262] Under the FERC's jurisdiction, utilities have a long history of protracted disputes with landowners and reliance on condemnation to acquire property.[263] While the FERC has included provisions mandating increased integration of the public under EPAct 2005, such provisions are unlikely to change the basic character of the siting process, which is fundamentally hostile to private property interests.[264] Legislation currently in committee in both houses of Congress that would require utilities to hold public hearings prior to siting transmission lines under federal jurisdiction similarly would do very little to change the essence of interstate transmission sitings.[265] Moreover, broader energy reform legislation currently being debated is likely to emphasize expedience over private property rights to an even greater extent.[266]

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[260] *Id.* Texas, for example, requires that utilities submit alternative route options, in addition to the usefulness of demand-side management and distributed generation as opposed to the construction of new lines. *Id.* at E-5 n.9.

[261] Raab & Susskind, *supra* note 198, at 7.

[262] *See generally* SUSAN L. CARPENTER & W.J.D. KENNEDY, MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS, AND CITIZENS' GROUPS 27 (2001) (providing guidance for conflict resolution processes in the public arena).

[263] *See generally* Mohr, *supra* note 44 (discussing disputes between landowners and utilities under the NGA).

[264] Speaking generally, any interaction between private property owners and developers seeking to condemn their land is presumably quite hostile. Erik Stock, *"We Were All Born on It. And Some of Us Was Killed on It": Adopting a Transformative Model in Eminent Domain Mediation*, 23 OHIO ST. J. ON DISP. RESOL. 687, 701 (2008) (advocating the use of transformative mediation for resolving eminent domain disputes).

[265] S. 32, 111th Cong. (2009) (introduced Jan. 6); H.R. 1922, 111th Cong. (2009) (introduced Apr. 2).

[266] *See supra* Part III.C (discussing pending energy reform bills and their failure to protect landowners from expanded federal jurisdiction over the siting of interstate transmission lines).

Mediation, in contrast, would seek to change the basic outlook of both utilities and landowners in the siting process. Mediation is able to change the basic character of siting disputes, containing the "unique potential for transforming conflict interaction and, as a result, changing the mindset of people who are involved in the process."[267] Rather than viewing the conflict as a battle to be won, the mediation process would encourage participants to ask: "How can we solve the problem?"[268] Representative parties meet face to face and openly discuss the range of concerns, agree on relevant facts, create options, develop criteria for choice, and aim to make decisions on which they could all agree.[269] Seeking to remove the adversarial, zero-sum mindset inherent in eminent domain litigation, the mediation program could concurrently mitigate many of the injustices and inefficiencies associated with condemnation.[270]

B. *Overview of the Recommended Mediation Process*

1. *Regional Transmission Organizations Would Oversee Negotiations*

To address Congress's concern that state siting boards often favor parochial interests related directly to their constituencies over national energy goals, regional boards should be created to balance local with national concerns. While state and local governments have opposed such a shift, claiming that greater regionalization or nationalization of transmission siting would trivialize concerns of local communities,[271] the use of mediation would satisfy these concerns. While it is beyond the scope of this paper to recommend in detail the interplay between state, regional, and national regulatory siting bodies, nearly all of the energy reform legislation pending

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[267] ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 65–66 (rev. ed. 2005) (advocating a "transformative" model of mediation, which seeks to give parties empowerment and recognition, and thereby helps them to resolve their current conflicts).

[268] CARPENTER & KENNEDY, *supra* note 262, at 27.

[269] *Id.*

[270] Stock, *supra* note 264, at 695.

[271] Eagle, *supra* note 58, at 24 (providing overview of states' objections to any changes that would divest them of siting authority).

before Congress suggests increasing regionalization,[272] and most experts have similarly called for such a shift.[273] As such, any revision to EPAct 2005 is most likely to rely on regionalized transmission organizations. With expanded federal jurisdiction over the siting of interstate transmission facilities, these regional bodies would be best suited to balance local and national interests,[274] and thus would be charged with overseeing the process of negotiations and mediation between landowners and transmission developers.

2. *The Public Hearing and Good Faith Negotiation Requirements*

Developers seeking to build interstate transmission facilities should be required to hold at least one public hearing in each county in which such facilities would be located, allowing all members of the public the opportunity to comment.[275] Companies should be required to provide adequate public notice prior to these meetings, allowing for broad inclusion to facilitate due process for all affected landowners.[276]

Additionally, any amendment to EPAct 2005 should require that utilities negotiate in good faith with property owners.[277] This provision should explicitly provide what constitutes good faith negotiations, giving all parties clear notification of their statutory duties.[278] Utilities should be encouraged to

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[272] *See* Benedetti, *supra* note 9, at 261–68 (providing overview of pending energy reform legislation). Only the SMART Energy Act would not create regional siting entities. S.108, 111th Cong. (2009). This bill would create an Energy Superhighway, governed exclusively by FERC. *Id.* § 101 (proposing amendment to § 224(c)(2) of the Federal Power Act).

[273] *See* Eagle, *supra* note 58, at 40 n.328 (citing articles that recommend regionalization).

[274] *Id.* at 43. Such entities, including the Bonneville Power Administration, Tennessee Valley Authority, and regional offices of the Environmental Protection Agency, have historically been very responsive to local concerns. Meyer & Sedano, *supra* note 12, at E-21.

[275] *See, e.g.*, GA. CODE ANN. § 22-3-160.1 (2005); *see also* S. 32, 111th Cong. (2009); H.R. 1922, 111th Cong. (2009).

[276] GA. CODE ANN. § 22-3-160.1 (2005).

[277] To see several state laws that require good faith negotiations prior to condemnation see Appendix.

[278] For example, good faith negotiations under Wyoming's eminent domain law include providing written details about the project and property sought, information about the condemnor, an initial written offer to purchase the land from the potential condemnee, an estimate of the property's fair market value, an offer to tour the property

initiate such negotiations as early as possible, preferably as soon as the need for transmission facilities is recognized.[279] In doing so, stakeholders would be engaged in an open planning process, working with the utility to consider the interests of all parties in the siting.[280] Such engagement would often be most effective via a neutral third-party mediator.

3. *Requesting Mediation*

At any time during negotiation, either party should have the right to request mediation.[281] Importantly, mediation would be required only upon request of either party. Depending on the circumstances, either side would have incentive to request mediation. Landowners would, for example, be incentivized to use mediators to help them clearly articulate their concerns, and through connecting their personal concerns to those of their community, to give these concerns greater weight.[282] Utilities would likewise be incentivized in many cases to request mediation, as the process would condense grievances of multiple landowners into one coherent voice, both improving their abilities to respond to landowner concerns and allowing them to do so more efficiently.[283]

Individual property valuations aside, it is likely that many affected landowners will share similar or identical concerns about interstate transmission projects. In these cases, utilities should retain the option to move to consolidate these cases for the purposes of mediation. Under these circumstances, landowners with identical interests would select representatives empowered to speak for them as a group.[284] Here, any

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with condemnee and offer to discuss relevant issues. WYO. STAT. ANN. § 1-26-509 (2007).

279 Meyer & Sedano, *supra* note 12, at E-32.

280 *Id.*

281 *See, e.g.*, WYO. STAT. ANN. § 1-26-509(h) (2007).

282 Juliana E. Birkhoff & Kem Lowry, *Whose Reality Counts?*, *in* THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 27, 28–31 (Rosemary O'Leary & Lisa Bingham eds., 2003). As benefits of mediation in the environmental context, the authors cite mediators' abilities to advocate for parties, and to increase "social capital," or the ability to draw upon relationship networks to empower communities.

283 Camacho, *supra* note 245, at 307 (explaining how collaborative land use agreements may decrease costs when used in place of bilateral negotiations).

284 Rossi, *supra* note 217, at 246 (discussing the optimal use of public participation to advance democracy and enhance the quality of deliberation).

landowner unsatisfied with representation and wanting to participate individually would carry the burden of proving either that the representatives are inadequate or that the landowner has an interest distinct from those already represented.[285] Because the costs of individualized participation are often excessive in light of the benefits they provide to either party, such an approach would provide a satisfactory balance between the need for procedural justice and the expedience sought in recent transmission siting legislation.[286] Importantly, consolidation could only occur after public hearings had been held, so that each landowner would have the opportunity to voice his or her unique concerns, thereby also making the case for individualized involvement. Although such an approach will in many cases not allow each individual landowner to directly participate in the mediation, this approach would most likely yield the highest-quality negotiations, in the most efficient manner practicable.[287]

4. *Selecting a Mediator*

Each regional siting board should maintain a database providing names of individuals qualified to meditate these disputes, though mediators should come from outside the FERC or any stakeholding organizations.[288] Because siting processes tend to be highly technical in nature, the FERC should require that mediators be adept at handling these technical issues.[289] Many state-level land use mediation programs require that mediators have expertise in land use planning and regulatory processes, as well as more general mediation qualifications.[290] Utilizing a mediator with substantial knowledge of both transmission infrastructure and the land use planning process will allow all parties to take advantage of the neutral's practical knowledge of the

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[285] *Id.*

[286] *Id.* at 194. Upon realizing that their interests are being adequately represented, parties are likely to take a less active role in the process voluntarily. Camacho, *supra* note 245, at 308.

[287] Raab & Susskind, *supra* note 198, at 10–11; Rossi, *supra* note 217, at 244.

[288] Michael L. Poirier Elliot, *The Role of Facilitators, Mediators, and Other Consensus Building Practicioners*, *in* THE CONSENSUS BUILDING HANDBOOK 199, 235 (Lawrence Susskind, Sarah McKearnan & Jennifer Thomas-Larmer eds., 1999).

[289] EDWARD CHRISTIE, FINDING SOLUTIONS FOR ENVIRONMENTAL CONFLICTS: POWER AND NEGOTIATION 279 (2008).

[290] Matthew McKinney, Patrick Field & Sarah Bates, *Responding to Streams of Land Use Disputes: A Systems Approach*, 60 PLANNING & ENVTL. L. 3, 5 (2008) (Colorado, Idaho, and Vermont laws all include this mandate).

feasibility of proposed alternatives, ability to offer creative solutions of his or her own, and experience in mediating disputes of a similar nature.

While the regional transmission organization may recommend mediators, the law should require that both landowners and utilities approve the mediator.[291] Joint selection of the mediator, as opposed to the siting board unilaterally appointing one, will avoid alienating any party and help induce cooperation from the outset. To avoid unnecessary delays, however, parties should be given a fixed time limit to agree on the mediator, after which the board could appoint one.

5. *Issues to be Discussed*

To be most meaningful, negotiations should be open to discussion of any issues.[292] These include, but are not limited to, landowners' concerns about losing their property rights, mitigation of the transmission facilities' potential adverse affects on property values, and mitigation of potential environmental or health risks.[293] By integrating stakeholders early in the siting process, these landowners will also be able to play a role in weighing the need for the facilities and the merits of potential alternatives.[294] If and when landowners accept the fact that the facilities must be built, discussions should focus on understanding what impacts are likely to occur, and how to best minimize them.[295]

The use of a technically-knowledgeable mediator will be crucial, as parties are likely to disagree on the effects of transmission facilities and general need for them. Where technical issues are beyond the mediator's expertise, assistance from outside experts may be permitted.[296] Although the use of 'dueling outside experts' could produce some antagonism between parties, the early inclusion of parties and encouragement of good faith agreements should to some extent lessen this risk.

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291 Elliot, *supra* note 288, at 235.

292 Raab & Susskind, *supra* note 198, at 12.

293 *Id.*

294 Meyer & Sedano, *supra* note 12, at E-32.

295 Raab & Susskind, *supra* note 198, at 12.

296 CARPENTER & KENNEDY, *supra* note 262, at 167–68.

6. *Failure to Agree, Partial Agreement, and Reverting to Condemnation*

The negotiation process will not take place independently, but within the broader scope of FERC's extant siting procedure. Regional boards will agree with private property holders as one of many factors in licensing transmission facilities. When parties are unable to agree on certain issues, utilities would continue with the siting process, including the right to use eminent domain in district or state courts. As such, there is no reason why, at a minimum, more input from the public cannot be gathered during the siting process.[297] At the very least, improved public participation would provide greater legitimacy to any ultimate condemnation of private property.[298]

VII. CONCLUSION

"The U.S. power transmission system is in urgent need of modernization. Growth in electricity demand and investment in new power plants has not been matched by investment in new transmission facilities."[299]

With several pending bills seeking to redesign the process for siting interstate transmission lines, it is clear that Congress will not ignore the need for improved transmission infrastructure. However, the pattern of regulation under the NGA, EPAct 2005, and recent legislation convincingly demonstrates that Congress may in fact ignore the plights of the landowners whose property is likely to be condemned to make way for an expanded transmission grid. Failure to adequately integrate landowners into the siting process will not only violate the President's promise of a "transparent, participatory, and collaborative government,"[300] but will also fail to achieve the streamlined siting process needed to efficiently update the grid.

With respect to the integration of landowners, any impending amendments to EPAct 2005 are likely to replicate FERC's current procedure for siting interstate transmission facilities. Though it does allow for public participation to a limited extent, FERC's procedure fails to integrate landowners in a meaningful manner, and as such may not satisfy due process

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297 Raab & Susskind, *supra* note 198, at 13.

298 *Id.*

299 American Society of Civil Engineers, Report Card for America's Infrastructure: Energy, http://www.asce.org/reportcard/2005/page.cfm?id=25 (last visited Mar. 31, 2010).

300 Memorandum on Transparency and Open Government, *supra* note 205.

or states' freshly-minted eminent domain reform laws. Further, tension between local siting authorities' attention to private property rights and federal authorities' focus on broader energy needs has led to difficulties since the enactment of the NGA in 1938. With America's recent struggle to maintain an adequate transmission infrastructure, this tension has grown even more pronounced.

A congressionally authorized mediation program has the ability to address all of these difficulties. Integrating landowners early in the siting process, but in a manner controlled through the use of a qualified mediator, will allow siting authorities to strike a balance between local and national needs without compromising the need to site transmission facilities efficiently. Given the magnitude of America's need for an improved transmission infrastructure, and its corresponding major implication for private property interests across the country, it is clear that transmission lines must be sited in a way that is sensitive to landowners' interests, but is also expedient. Considering mediation's success in fostering a number of collaborative agreements regarding land use, there is reason to be optimistic that in this context, it can succeed.

APPENDIX

State	Bill and Relevant Statutes	Applies to whom?	Public Hearing Requirement	Dispute Resolution Authorization / Landowner Assistance	Good Faith Negotiations Required?
Ga.	H.B. 363, Ga. Gen. Assem (2006). GA. CODE. ANN. § 22-3-160 – 162 (2009)	Specifically targets electric utilities.	Before exercising right of eminent domain, any utility shall hold one or more public meetings in each county in which the transmission line would be located, with an opportunity for comment by members of the public. Includes extensive public notice requirements. In any county in which the electric transmission line would require acquisition of property rights from more than 50 property owners, two or more public meetings shall be	None.	After the utility has selected the preferred route for the location of an electric transmission line, the utility shall attempt in good faith to negotiate a settlement with each property owner from whom the utility needs to acquire property rights for the line. In connection with the negotiations, the utility shall provide the property owner with a written

			held.		offer to purchase the property rights, a document that describes the property rights, and a drawing that shows the location of the line on the owner's property
Minn.	S.F. No. 2846, 5th Engrossment – 84th Leg. (Minn. 2005-06). MINN. STAT. ANN. §§ 117.036, 117.0412, 117.189 (West 2010).	Exempts "Public Service Corps.," including utilities.	Yes. Must hold at least one public hearing before a local government. Condemnor must notify each owner of property that may be condemned of the public hearing.	None.	Before commencing an eminent domain proceeding, the acquiring authority must make a good faith attempt to negotiate personally with the owner of the property in order to acquire the property by direct purchase instead of the use of eminent

					domain proceedings.
Mo.	H.B. 1944, 2006 Gen. Assem. (Mo. 2006). MO. REV. STAT. §§523.256, 536.277-section does not exist (2010).	Applies to all condemnors.	None.	Creates an office of ombudsman. Ombudsman should assist citizens by providing guidance regarding the condemnation process. Ombudsman also shall submit a yearly report to the general assembly on the use of eminent domain.	In absence of good faith negotiations, the court shall dismiss the condemnation petition, without prejudice, and shall order the condemning authority to reimburse the owner for his or her actual reasonable attorneys' fees and costs incurred with respect to the condemnation proceeding which has been dismissed.

Utah	H.B. 365, 2007 Gen Sess. (Utah 2007). UT STAT. §§ 78B-6-505, 78B-6-522	Applies to all condemnors.	None.	The private property owner may submit the dispute for mediation or arbitration to the private property ombudsman. A mediator or arbitrator, acting at the request of the property owner, has standing to file with the district court a motion to stay the action during the pendency of the mediation or arbitration. Condemnor must advise property owner the name and telephone number of a property rights ombudsman.	Each person who seeks to acquire property by eminent domain ... shall make a reasonable effort to negotiate with the property owner for the purchase of the property.

W. Va.	H.B. 4048, 2006 Leg. (W. Va. 2006). W. VA. CODE ANN. § 54-1-2a).	Applies to all condemnors.	None.	None.	Condemnor must make a reasonable attempt to notify all parties subject to a petition for condemnation, and attempt to enter into negotiations for purchase of the property with the owners. Condemnor shall make an offer in good faith for the purchase of the property prior to initiation of the condemnation proceeding.
Wyo.	H.B. 124, 59th Leg. 2007 Gen. Sess. (Wyo. 2007) (2007). WYO.	Applies to all condemnors.	None.	At any time in the negotiation, at the request of either party and upon mutual agreement,	Condemnor shall make reasonable and diligent efforts to acquire property by good faith

	STAT. ANN. §1-26-509 (2007).			dispute resolution processes including mediation or arbitration may be employed, or the informal procedures for resolving disputes established pursuant to W.S. 11-41-101 through 11-41-110 may be requested through the Wyoming agriculture and natural resource mediation board.	negotiation. Condemnee must make reasonable and diligent efforts to negotiate in good faith with the condemnor, including a timely response to the written offer specifying areas of disagreement. Condemnor must offer to tour property sought with condemnee or condemnee's representative.